COLUMBIA LAW REVIEW.

VOL. III MARCH, 1903 No. 3

WHAT IS THE LAW MERCHANT?

Even if those sentences of mine, quoted by Professor Burdick, were wrong, it was worth while writing them in order that we might have the very interesting article in which they are attacked.[1] Let me transcribe the two principal sentences impeached, adding two others from the context, and then make such defence as I can:

"As a matter of fact, and not merely of phrase, may we not even ask whether there is a law of merchants, in any other sense than there is a law of financiers, or a law of tailors? Frequent use of the word has almost produced the impression that as there was a civil law and a canon law, so also there was somewhere a 'law merchant' of very peculiar authority and sanctity; about which, however, it is now quite futile to inquire and presumptuous to argue. If the *custom* of merchants as to bills of exchange was recognized by the courts, so also has the custom of financiers as to the negotiability of bonds and scrips been recognized; but no one would think of referring to the 'law financier' in speaking of that negotiability. * * * The rules respecting bills and notes are not traceable to any foreign or extraneous body of law."[2]

Now, I cannot deny that Professor Burdick's authorities are of the most overwhelming and convincing sort. And I admit that they establish the following propositions:

1. There were special courts for the administration of what was called the law merchant—courts pepoudrous, staple courts, courts of merchants, etc.

2. That these courts proceeded according to a practice quite different from, and much more expeditious than, the common law courts.

[1] 2 COLUMBIA LAW REVIEW, 470. [2] Ewart on Estoppel, 373-4.

3. That in such courts decisions were regulated by what was called the law merchant—the Statute of the Staple,[1] providing—

"that all merchants coming to the Staple shall be ruled by the law merchant * * * and not by the common law of the land."

4. That many authorities declare that this law merchant was so well known that it was practically the same in all European countries.

5. That many authorities point to the law merchant as being the source of many of our present legal ideas.

And admitting all this, there seems to be little to do but to admit Professor Burdick's conclusion:

"It is apparent * * * that for several centuries there was a true body of law in England which was known as the law merchant. It was as distinct from the law administered by the common law courts as was the civil or the canon law."

Let us change the subject for a moment. Suppose that I had said, and had been attacked for saying, that, "As a matter of fact, and not merely of phrase, may we not even ask whether there is a Law of Nations?" In this case, too, I would have to make the same damaging admissions. I would agree—

1. That there was in the Roman law a special court for the administration of the "Law of Nations."[2]

2. That the practice in such court differed from that in other courts. (I am not sure that it did, but the point is immaterial.)

3. That in such court decisions were regulated by what was called "the Law of Nations."

4. That Justinian's Institutes declare that private law

"is composed of three elements, and consists of precepts belonging to Natural Law, to the Law of Nations, and to the Civil Law;"[3] and that "the Law of Nations is common to all mankind."[4]

5. And that Justinian also declared that

"by the Law of Nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others"[5]

---

[1] 27 Ed. 3, 2. [2] The court of the Prætor Peregrinus.
[3] Tit. I, s. 4. [4] Tit. II, ss. 1, 2. [5] Tit. II, s. 2.

I would admit all this; and yet Professor Burdick would agree with me that when the first prætor (the Lord Mansfield, in some sense, of his day) took up his first case, or issued his first edict, there was no "true body of law" in Rome or elsewhere "that was known" as the Law of Nations.

Changing again, let us ask: "As a matter of fact and not merely of phrase, whether there was ever a body of law known as the Law of Nature"? We must admit, of course, that our law books are full of references to it; that Justinian declares that the laws of nature

"which all nations observe alike, being established by a divine providence, remain ever fixed and immutable;"[1]

that the Stoics thought that they knew all about these laws of nature; that Rousseau discoursed about them in fashion that moved the world; and that everybody thinks he has some special insight into them. And yet, Professor Burdick will agree that, save in so far as such laws have been done into statutes and decisions, there is no "true body of law" in England or elsewhere that was known as the Law of Nature.

Changing once more, "As a matter of fact and not merely of phrases, may we not even ask whether there is a Common Law or an Equity"? Of course, there are, or were, courts for the administration of what goes by these names; and their practices are different, and so on; but *when these courts were first established* was there, or was there not, "a true body of law in England which was known as" Common Law or Equity? We have now statutes, and decisions, and responsa prudentium (as we may call our text books—or some of them); but these are not the common law. These are tangible, legible, concrete things—at best ascertainments of what is called the Common Law.[2] The Common Law is, and always was, in the air. Put it into authoritative, legible shape, and it has changed its character. It has become Judiciary Law. Bentham made

[1] Tit. III, s. 11.

[2] They are not even that. Nor, as has been said, are they evidence of what the Common Law was; for no one imagines that they are results of actual inquiry into what law was common to all Englishmen.

that all clear to us, long enough ago.[1] In the same way the Law of Nations became Prætorian law as soon as it appeared in the Prætor's edict.[2] If you are in doubt about it ask yourself the meaning of the phrase "derived from the common law." Does it mean, derived from some statute, or decision, or code, or other portable document? Not at all. Or does it mean derived from some investigation into what was the law common to all persons, or to all English persons? No, not in the slightest.

And may we not fairly ask, if there was "a true body of law in England which was known as the law merchant," that we may have a look at it; or if it has been lost, that we may be furnished with a statement from somebody who at some time did see it, or knew somebody who had heard that anybody had ever seen it? It "is easier longed for than found," said the great Judge Willes.[3]

Professor Burdick claims that the "ancient law merchant * * * was a body of substantive law;" that it existed "for several centuries" prior to the time of Coke; that between the times of Coke and Mansfield (1606–1756) the term law merchant "loses much of the definiteness which characterized it" prior to that period; and that since Mansfield's date "these two bodies of rules (Law Merchant and Common Law) no longer stand apart as they did three centuries ago." As against this I contend that there was no body of Law Merchant before Mansfield; that prior to that time there was nothing but a heterogeneous lot of loose undigested customs, which it is impossible to dignify with the name of a body of law; that Mansfield (principally) formulated, developed and declared what is called the Law Merchant, and that its "rules are not traceable to any foreign or extraneous body of laws." For settlement of the question I am now going to appeal to Professor Burdick's article.

---

[1] "Common Law, as it styles itself in England, judiciary law as it might more aptly be styled everywhere." Principles of Morals and Legislation, Preface, p. 8. And see Jenks' Law and Politics in the Middle Ages, p. 39.

[2] "Prætorian obligations are those which the prætor has established by his own authority." Justinian's Inst. Lib. III, tit. XIII, s. I.

[3] Lloyd *v.* Guibert (1865) L. R. 1 Q. B. 125.

He divides the English history of the subject into three periods:[1]

(1) Prior to Coke (1606), when the old pepoudrous and staple courts were in full activity, and the "body" was no doubt in robustest condition.

(2) Between Coke and Mansfield (1606–1756), when the jurisdiction was passing from the old courts to the regular tribunals, during which, "the term law merchant loses much of its definiteness."

(3) Lord Mansfield and subsequently.

Remembering that we are in search of "a true body of law," and not a mere set of customs, at the time when Coke's court was acquiring jurisdiction in merchants' cases, let us see how Coke and the other judges proceeded. Did they get a look at the "true body of law," or even know anything of its existence? Professor Burdick supplies the only possible answer. He says that evidence was called in each case, and

> "The law merchant was proved as foreign law now is. It was a *question of fact*.[2] Merchants spoke to the existence of *their customs*, as foreign lawyers speak to the existence of laws abroad. *When so proved, a custom was part of the law* of the land. This condition of things existed for about a century and a half" (1606–1756).

This procedure is very familiar to all of us. We have, for example, a grain case: The grain men have certain customs applicable to the point in dispute; we give evidence of that custom; and the court decides with reference to it. But we should never make the mistake of saying that prior to such evidence there was "a true body of law" upon the subject known as the law-grain-dealer—a law never theretofore heard of by the judges.

I do not wish unduly to press for a rigid or technical meaning of the words "a body of law," and get myself into dispute with the advocates and opponents of Austin's definition. But attaching almost any significance to the term, may I not fairly say that there never was "a true body of *law*" in England, the existence of which had to be proved as a *fact?* And yet that was what had to be done before Coke would recognize the "law merchant."

[1] Following here and elsewhere the Introduction to Smith's Mercantile Law.

[2] Italics here and elsewhere are those of the present writer.

And it will be observed that what was proved was not law at all, but, as Professor Burdick says, customs. "Merchants testified to the existence of their *customs*." Just as financiers or tailors would testify as to theirs. "When so proved" (not before) "a custom was part of the law of the land."

We may say then that there was not much that looks like "a body of law" when Coke commenced his duties; that is, when there was a law merchant if ever there was one. Let Professor Burdick (quoting from Scrutton) now tell us to what extent it materialized during the succeeding 150 years:

"*As the law merchant* was considered as *custom*, it was the habit to leave the custom and the facts to the jury without any directions in the point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost *impossible to separate the customs from the facts; as a result little was done towards building up any system of mercantile law in England.*"

And Scrutton was right, for Buller, J. (Mansfield's colleague) tells us that

"Before Lord Mansfield's time we find that in the courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury and *they produced no established principle.*"[1]

But we are now a full century and a half after the time when "a true body of law" had existed; when it had been administered by special courts, and with special practices; when it was so well known that it had come to be practically the same in all European countries (so it is said); when it had commenced shedding offspring in the way of peculiar laws as to partnership, *jus accrescendi*, stoppage in transitu, etc. (so we are told). And we have thus the very peculiar situation of "a true body of law" in robustest condition in 1606, but so unknown to the judges from that time on that its existence had to be proven to them; and a law always so jumbled up with the facts that after the regular courts had been at it for a century and a half all we can say is that little had been done "towards building up *any* system of mercantile law in England;" that "*no* established principle had been produced."

Professor Burdick tells us, what indeed we might have expected, that "Lord Mansfield was dissatisfied with this

[1] Lickbarrow *v.* Mason (1787) 2 T. R. 63.

condition of the law and devoted his great abilities to its improvement." And watching for a little the methods of that great judge,[1] we shall be able to see whether he thought that he had in hand "a true body of law" which he was endeavoring to administer, or whether he was really formulating, developing, and declaring something of his own, or nearly so. Professor Burdick shall again help us:

"We are told that he reared a special body of jurymen at Guildhall, who were generally retained in all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them, but inviting them to dine with him. From them he learned the usages of trade, and in *return* he *took great pains in explaining to them the principles of jurisprudence by which they were to be guided.* * * * When a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it * * * The great study has been to find some general principle, not only to rule the particular case under consideration, but serve as a guide for the future * * * It was from such sources,[2] and from the current usages of merchants, that he *undertook to develop a body of legal rules* which should be free from the technicality of the common law, and whose principles shall be so broad, and sound, and just *as to commend themselves to all courts in all countries.*"

But why all this bother if 150 years before there was in existence "a true body of law in England which was known as the law merchant;" if during those 150 years Coke and others had been administering that law; and if, as Professor Burdick tells us, Lord Mansfield had theretofore "discovered that the usages and customs of merchants were in the main the same throughout Europe"?

Here my defense might end. But I should be misunderstood if I did not explain myself more fully. I must vindicate my view, of the phrases, The Law of Nature, The Law of Nations, Equity, The Law Merchant. Here, too, I may take the liberty of diverging from current methods of thought and expression; but I shall not be without some solid support for my notions. I have not space for many

[1]Observe what he himself said in Luke *v.* Lyde (1759) 2 Burr. 887, about his methods.

[2]The Rhodian laws; the Consolate del Mare; the laws of Oleron and Wisly; the Ordinances of Louis XIV, etc., of which most probably Lord Mansfield's guests had never heard.

citations. Let the student refer to the books mentioned below.[1]

The human mind craves generalizations and unifications, and it will play many dishonest tricks with itself in order that it may enjoy the gratification of these seeming requisites of intellectual satisfaction. See what it has done with our legal history:

"The Law of Nature"! What a fine, mouth-filling, soul-satisfying nonentity. Follow it through Greeks, Stoics, Roman Lawyers, Mediæval Ecclesiastics, Grotius, Hobbes, Rousseau, Bentham, and make an entity—"a true body" of it, if you can. In metaphorical and figurative sense we may speak of the laws of nature, meaning some observed physical sequences. But this "Law of Nature," was it ever anything but an empty abstraction or even hallucination? a sort of a shadow of some "lost code" that never existed? an underlying principle[2] which, could we but find it (fire, air, water, etc., have all been advocated and rejected), would, we may fancy, correlate and explain everything; but which still unfortunately for us *underlies* and is for the present at least plainly *not* capable of being got out of that? It is said that it is that

> "Ultimate principle of fitness, in regard to the nature of man as a rational and social being, which is, or ought be, the justification of every form of law."[3]

but that sort of a principle is, of course, a little difficult to look at quite steadily. In truth we only call it a principle, as we call God a spirit—because we don't know what a spirit is, and must say something. If, too, we are told that it is

> "The rules of conduct deducible by reason from the general conditions of human society"[4]

may we not humbly ask that some able reasoner will deduce them, and once for all and forthwith print them?

---

[1]Sir Henry Maine's works—principally his Ancient Law; Sir Frederick Pollock's Essays in Jurisprudence and Ethics, Cap. 2 & 12; and his articles in 1 COLUMBIA LAW REVIEW, 11, and 2 COLUMBIA LAW REVIEW, 131; James Bryce's Studies in Hist. and Jur. Essays XI and XIV; Holmes' The Common Law; Lightwood's The Nature of Positive Law; Jenks' Law and Politics in the Middle Ages. [2]See Maine's Ancient Law, 77.

[3]Sir F. Pollock in 1 COLUMBIA LAW REVIEW, 11. [4]*Ib.* 14.

We are more inclined to the suggestion that the Law of Nature is

"The ideal to which actual law and custom could only approximate."[1]

but we must add that it is an ideal of very vague, fluctuating, and uncertain character, swinging according to times and persons from the heroisms of savagery to the beatitudes of the Sermon on the Mount; and that no clear-headed man will undertake to put it in type. It no doubt has its uses if left as

"A mental vision of a type of perfect law."[2]

but, on the whole, it will do better if left there than if photographed by some spiritualistic or other occult apparatus. Austin rejects altogether "the appellation Law of Nature, as ambiguous and misleading." He calls it "the Divine Law or the Law of God," which, he says, makes everything clear—in this fashion:

"There are human actions which all mankind approve; human actions which all men disapprove. * * * Being common to all mankind and inseparable from the thoughts of those actions, these sentiments are marks or signs of the Divine pleasure. * * * The rectitude or pravity of human conduct * * * is instantly inferred from these sentiments without the possibility of mistake."[3]

All of which indicates that Austin had little acquaintance with evolutionary and comparative ethics.[4] Later writers have found no difficulty in declaring that this

[1] *Ib.* 14, and see Maine's Ancient Law, 77.

[2] Maine's Ancient Law, 77 ff.

Austin's Lectures on Jurisprudence, 105 f.

[4] I do not remember to have seen anywhere the argument against God-given ethics that if that is their true source we might reasonably have expected that we should also have been supplied with infallible ideas as to the varying degrees of "pravity" involved in the various acts of misconduct. But our judgment as to the degrees are most helplessly human. "A theocracy brands blasphemy and idolatry as crimes deserving of death, while it looks upon a boundary violation as a simple misdemeanor (Mosaic law). The Agricultural State, on the other hand, visits the latter with the severest punishment, while it lets the blasphemer go with the lightest punishment (Old Roman law). The Commercial State punishes most severely the uttering of false coin; the Military State, insurbordination and breach of official duty; the Absolute State, high treason; the Republic, the striving after regal power." Ihering's The Struggles for Law, 45. See also Lecky's Hist. of European Morals, VII; Muirhead's Elements of Ethics, 193,

Divine Law "is merely our old friend the Law of Nature in very transparent disguise."[1] And so it is.

Since Sir Henry Maine and the other writers above noted, no one can be excused for disbelief in "the Historical Method before which the Law of Nature has never maintained its footing for an instant."[2] The early English Common Law lawyers used the phrase the "Law of Reason" in a sense much equivalent to the Law of Nature. They would "say that such and such a rule is grounded in reason"[3]; just as now and then our own judges will say that their view is in accordance with "the elementary principles of justice." Locke speaks of the "Law of Nature, which is the same thing as the Law of Reason,"[4] and of "the Law of Nature—that is, the will of God."[5] Hobbes refers to the "Law of Nature—that is to say, common equity"[6]—such laws being "contained in this one sentence, Do not that to another which thou thinkest unreasonable to be done by another to thyself."[7] With the Stoics, "Live according to Nature" really meant "Live according to Reason."[8]

Turning now to the "Law of Nations," let us see whether it presents any more solid substantiality? Do not take the phrase to mean the Law *between* Nations. But if you do, observe that international law is based upon notions of rules which *ought* to guide and control international action; and that these notions are but by slow degrees emerging into formulas and definitions,[9] without which you may talk about laws but have none.[10]

The Law of Nations was known to the Romans as the *Jus Gentium*. It was presumed to be "the sum of the common ingredient in the custom of the old Italian tribes."[11]

[1] Lightwood's The Nature of Positive Law, 19. [2] Ancient Law, 86–7.

[3] Bryce's Studies in Hist. and Jur. 600.

[4] On Govt. Bk. II, c. 8; and see c. 2. [5] *Ib.* Bk. II, c. 11.

[6] Leviathan, 127. [7] *Ib.* 126, Cf. Justinian's Inst. Lib. 1, Tit. I.

[8] Pollock's Essays Jur. and Ethics, 334.

[9] "International law may be defined to be the aggregate of rules regulating the intercourse of states which have been gradually evolved out of the moral and intellectual convictions of the civilized world as the necessity for their existence has been demonstrated by experience." Hannis Taylor on Internat. Pub. Law, 86; and see p. 364.

[10] Except in crudest condition and regulative of simplest transactions.

[11] Maine's Ancient Law, 49.

But in reality it was nothing more or less than a very transparent device by which the Romans improved their own *Jus Civile*—brought it down (or up) to date.

"Institutions are the products of the past process, are adapted to past circumstances, and are therefore never in full accord with the requirements of the present."[1]

More than that, man progresses, but his institutions, his systems of law (and other things) harden and cake around him, and must be got rid of by explosion or subtle infusion. And the development of the law is a history of cake and infusion.

This *Jus Gentium* was a stroke worthy of the Roman genius. (Very like our English Equity, as we shall see.) There was to the Romans a distinction between the civil law (that is the peculiar law of any particular State), and those laws which were to be found in every State. One evidently was merely conventional, and the other was derivable from the nature of things. Not that the Roman lawyers had in reality collocated the foreign laws, and having scored out all discrepants, had produced an anthology of synoptics. No, this distinction between local and universal law was not one of ascertained existence; it was nothing but the difference between the Roman law as it was, and the Roman law which more enlightenment declared it ought to be. And the assertion of a law common to all nations[2] was nothing but a particularly happy method by which the law was brought into harmony with current notions of justice.[3]

---

[1] Veblin's The Theory of the Leisure Class, 191.

[2] "The Law of Nations is common to all mankind": Justinian's Inst. Lib. 1. Tit. 2, s. 2.

[3] Mr. James Bryce tells us that the Roman magistrates proceeded "by taking those general principles of justice, fair dealing, and common sense, which they found recognized by other peoples as well as their own," ("If indeed we are to suppose that the Prætors ever really did study the laws of the various neighbors of Rome," p. 619); "and by giving effect to those mercantile and other similar usages which they found prevailing among the strangers resident in Rome. Thus by degrees they built up a body of rules * * * which, while it resembled their own system in many of its general features, was less technical and more consonant to the practical convenience and general understanding of mankind." Studies in Hist. and Jur. 571–2.

The first excuse for departure from the *Jus Civile* was found in cases in which a foreigner was a party. Romans (not usually superfluously deferential to foreigners) assumed that in such cases it would not be fair to apply their own law; and so they consulted all other laws (really consulted their own ideas of equity), and gave judgment accordingly. Principles thus adopted very soon affected the whole body of the civil law of Rome, and finished by complete amalgamation with it, and much improvement of it. (Very like our English Equity history.)

The Law of Nations had precisely the same basis, and solidity or frailty as the Law of Nature—"the rules of conduct deducible by reason from the general conditions of human society"; "the ideal to which actual law and custom could only approximate";[1]—the ideal to which, in spite of caking, we have always determined that they shall so far as possible approximate. The history of these laws being closed, we can now see that "the Law of Nature is simply the Law of Nations seen in the light of a peculiar theory, * * * the expressions were practically convertible";[2] and that the *Jus Gentium* was merely Prætorian Law (upon pretence of being law common to all nations), even as so much of our own law is judge law, upon pretence of being law common to all England—with this difference: that the Prætors avowed their law-making proclivities,[3] while our judges are supposed to *find* laws—in the bullrushes or some other improbable place.[4]

And what are we to say of the Common Law? Surely there was a Common Law somewhere? Have we not Common Law courts, and Common Law books, and Common Law at the very basis of our American and English and Canadian law? Yes, yes; but what was it? and where did it come from? is it here yet? or has it vanished? and did anybody ever see it? or is it mere *space* with judge-law filling? Do not let us imagine at any rate that there is some old book somewhere in which the Common Law is written down.

---

[1] *Ante*, p. 142.

[2] Maine's Ancient Law, p. 57. And see Hannis Taylor's article in 175 North Am. Rev. 465; and Bryce's Studies in Hist. and Jur. 581. The identity of the laws was adopted by Grotius.

[3] See Justinian's Inst. Lib. I, tit. 2, s. 7; Lib. III, tit. 13, s. 1.

[4] See Maine's Ancient Law, 32, 33.

And do not let us think that "the Common Law of England," about which we hear so much, is the only or the first Common Law, or that it has anything very peculiar about it. Upon the contrary, away back among the Greeks

"Aristotle divides law into that which is *Common, being in accordance with nature and admitted by all men;*" (our old friend Law of Nature) "and that which is peculiar, settled by each community for itself."[1]

and Demosthenes refers to the "Common Law of all mankind."[2] Justinian too declares that

"Every community, governed by laws and customs, uses partly its own law and partly laws common to all mankind (*Communi omnium hominum*)"[3]

And the Stoics identified the Law of Nature or the Common (Universal) Law with the Divine reason.[4]

The Common Law then is not a code, or a body of law, or an anthology of synoptics. It is precisely the same thing as the Law of Nature and the Law of Nations[5]—the vague, undefinable ideal to which we feel that we are stumblingly approaching; guided by reason into the right road, some say; cuffed by failures out of the wrong, think I.

Lord Esher pretty well unmasked this glorified unreality, the Common Law, when he said that

"The duty of the Judge is to find out what is the rule which people of candor and honor and fairness in the position of the two parties would apply in respect to the matter in hand. That is the Common Law of England."[6]

Professor Thayer (whose death was a great loss) said that

"the exercise of their (the judges') never questioned jurisdiction of declaring the Common Law * * * has consisted in a great degree in *declaring the scope and operation of sound reason,* wherein the Common Law so largely consists."[7]

---

[1]Bryce's Studies in Hist. and Jur., 567. [2]*Ib.*, p. 568.

[3]Institutes, Lib. 1, Tit. 2, s. 1. [4]Bryce's Studies, 568.

[5]"The Law of Nations is Common to all mankind": Justinian's Institutes, Lib. I, Tit. 2, s. 2. [6]Speech 15 Nov., 1897.

[7]Evidence at the Common Law, 207–8. Prof. Thayer speaks of "the Common Law system of Evidence." But of course he does not mean the common custom of all England as to evidence. He says "We have generated and evolved this large, elaborate and difficult doctrine. We have done it not by direct legislation, but almost wholly by the slowly accumulated rulings of judges made in the trying of cases during the last two or three centuries" (p. 2; and see 207–8).

Lord Bowen declared that the Common Law is an "arsenal of common-sense principles." And Maine if asked for a rough definition would say that "Law is common sense."[1]

This Common Law of England is the most impudent pretender of all these phantom laws. For unquestionably a very large part of it was not law of England at all (common or special) but simply Roman law, smuggled in by Bracton[2], openly introduced by Holt,[3] consciously and unconsciously adopted by many others. And perhaps the idea that the Common Law of England was "the law of the royal court," as opposed to the local laws of the old seigneurial courts—a sort of *jus gentium* imposed by a Prætor Peregrinus—is the real meaning of the term.[4] Maine thinks that by its earliest expositors

"it was regarded as existing somewhere in the form of a symmetrical body of express rules, adjusted to definite principles. The knowledge of the system however in its full amplitude and proportions was supposed to be confined to the breasts of the judges; and the lay public and the mass of the legal profession were only permitted to discern its canons intertwined with the facts of the adjudged cases. Many traces of this ancient theory remain in the language of our judgments and forensic arguments."[5]

Equity has never had such a concrete look as this Common Law (the adjective of which might have kept us right if we had not forgotten its significance). Equity, we admit, is an unwritten and inexpressible aspiration. But have you observed (as hinted at above) that as the Roman Civil law, built of common sense, became caked and afterwards yielded to a new infusion of more common sense (insidiously introduced under the name of the Law of Nations); so the Common Law of England, builded of reason and caked by custom (precedents and forms)[6], succumbed to more reason through the fiction of the King's conscience[7]? Æquitas (the meeting point of Law of Nature and Law of Nations) played in the Roman Reformation of law very

[1] Village Communities, 258. [2] Maine's Ancient Law, 82.

[3] Law of Bailments in Coggs *v.* Bernard (1703), Ld. Raymond, 909.

[4] Jenk's Law & Pol. of the Middle Ages, 35-6.

[5] Village Communities, 335. [6] Bryce's Studies in Hist. & Jur., 697.

[7] "It is the special business of Equity to reintroduce those considerations which have been dropped in arriving at the rules of law." Lightwood's The Nature of Positive Law, 40; and see p. 300.

much the same part as Equity in the English.[1] Mr. Bryce's description of it would answer for both systems. He says

> "Equity means, to the Romans, fairness, right feeling, the regard for substantial, as opposed to formal, and technical, justice, the kind of conduct which would approve itself to a man of honor and conscience"[2]

We are now a little better prepared for a true understanding of the Law Merchant. So far we have had various titles and we have found them to be perfectly empty of meaning—mere names and nothing there to name. How is it with the Law Merchant?

In the present writer's opinion the amelioration and improvement of English law is attributable (apart from legislation and acknowledged fictions) to Equity, Common Counts, Public Policy and Law Merchant. Equity was a renaissance—a return to the Law of Nature, or the Law of Nations, or the Common Law (reflect on that for a moment), or Common Sense as you may choose to call it. Mansfield's tricks with the Common Counts[3] and the Law Merchant were in reality but new and ingenious and masterful methods by which human reason of years gone by (obsolescent indeed, but caked and riveted there) was made to yield to human reason of later time. The cakes were called the Common Law, but they had ceased to represent common sense. The new human reason might also (just as properly) have been called the Common Law, but they named it Law Merchant, and people ever since have been looking for the thing, not knowing that it was nothing. Find the Law of Nature, the Law of God, the Law of Nations, the Law of Reason, the Law Universal, the Common Law, Equity—find Common Sense, and I shall have much pleasure in accepting at your hands an introduction to the Law Merchant.

Am I wrong in thus identifying the Law Merchant with these other empty names—these *aliases*, given by ourselves

---

[1]See Maine's Ancient Law, cap. 3. [2]Studies in Hist. and Jur., 581.

[3]Lord Mansfield was quite frank in what he did. Weaker men would have pretended some precedent. Mansfield avowed that "the gist of this kind of action is that the defendant upon the circumstances of the case is obliged by ties of natural justice and equity to refund the money." Moses *v.* Macferlan (1760), 2 Burr. 1005. And weaker men ever since have been attributing Mansfield's decisions to the Common Law and the Law Merchant. Blackstone knew better and ascribes Mansfield's work to "Natural reason and the just construction of the law" (Commentaries, Bk. III, c. 9).

for the further fooling of ourselves? Let me at least shield myself behind Professor Burdick who says that

"Godolphin quotes with approval the statement of Sir John Davies, that the Law Merchant, *as a branch of the Law of Nations*, has ever been admitted," &c.[1]

who quotes from Sir John Davies:

"Which Law Merchant, as it is part of the Law of Nature and Nations is universal, and one and the same in all countries of the world."[2]

"The Law Merchant which is a branch of the Law of Nations."[3]

who quotes also from Dr. Zouch:

"It is manifest that the causes concerning merchants are not now to be decided by the peculiar and ordinary laws of every country, but by the general *laws of Nature and Nations.*"[4]

and who himself writes:

"As early as 1473 the Chancellor had declared that alien merchants could come before him for relief, and there have their suits determined by the *Law of Nature* in chancery. . . . *which is called by some the Law Merchant, which is the Law Universal of the world.*"[5]

But for all prose purposes we might as well speak of the Law Universal of the Universe; for this ubiquity which people are accustomed to attribute to their own ideas is asserted for the same evidential purposes as the avatar claims of all religion-founders, and with as much verity as (we shall say) all but one of these. "The Law of Nature is binding over all the globe in all countries," said Blackstone,[6] without meaning anything in particular. "The Law of Nations is common to all mankind," said Justinian,[7] meaning nothing at all. There is "a Common Law of all mankind," said Aristotle and Demosthenes and Justinian, meaning as much. There is a "Law of God," said Austin

[1] 2 COLUMBIA LAW REVIEW, 477.

[2] *Ib.* 477. [3] *Ib.* 478. [4] *Ib.* 477–8.

[5] *Ib.* 485. In 1473 it was said by Stillington, Edward the Fourth's Chancellor, in the great case of larceny by a carrier breaking bulk, that the cause of merchant strangers "shall be determined according to the Law of Nature in the Chancery." Foreign merchants put themselves within the king's jurisdiction by coming into the realm, but the jurisdiction is exercisable "secundum legem naturæ que est appelle par ascuns ley marchant, que est ley universal par tout le monde." Y. B. 13 Ed. 4th 9, pl. 5. Quoted from Sir F. Pollock, 2 COLUMBIA LAW REVIEW, 28.

[6] Commentaries, Introd. s. 2. [7] Institutes, Lib. 1, tit. 2, s. 2.

—a veritable legal touchstone—meaning, if possible, still less. And now Professor Burdick quotes for us that there is a "Law Merchant which is the Law Universal of the world." Would that some swift lineotype could catch this thing, and reduce its irritating omnipresence (much too big to look at) to some one geographical spot, for sixty seconds, or even less.

This Law Merchant "one and the same in all countries in the world"! And Coke and his successors after one hundred and fifty years' work at it had done little "towards building up any system of mercantile law in England." "The same in all countries"! And poor Mansfield in his day dining his specially qualified merchant jurymen and taking "great pains in explaining to them the principles of jurisprudence by which they were to be guided."[1] "The same in all countries"! Listen to Lord Campbell's account of Mansfield's time:

> "Hence when questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine insurances, and respecting bills of exchange and promissory notes, *no one knew how they were to be determined.* Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports. . . . If an action turning upon a mercantile question was brought into a court of law, the Judge submitted it to the jury, *who determined it according to their notions of what was fair,* and *no general rule* was laid down."[2]

"The same in all countries"![3] And Mansfield, endeavoring "to develop a body of legal rules," which he hoped would "commend themselves to all courts in all countries," —so Professor Burdick tells us—but they didn't.

If there is any one point of mercantile law more than another that would have been agreed about in Europe, it

---

[1] *Ante*, p. 141. [2] Lives of the Chief Justices, III. 274.

[3] [It may be well to set over against this statement the following extract from an address delivered to the American Bar Association last summer, by M. D. Chalmers, C. S. I., and printed in *The Law Quarterly Review* for January, 1903: "Lord Mansfield and Mr. Justice Story, in judgments which are too well known to need citation, have emphasized the essential unity of the law merchant throughout the world; and in more recent times, Lord Blackburn has again enunciated the rule. 'There are, he says, 'in some cases differences and peculiarities which by the municipal law of each country are grafted upon it, and which do not effect other countries; but the general rules of the law merchant are the same in all countries."—F. M. B.]

would have been the question of title (as against the true owner) to goods purchased at the fairs to which the merchants were accustomed to travel for trade purposes. But it is impossible to say that European law concurred with the English law of market overt upon the subject.

If there is any one point in the law of "negotiable securities" about which we might have expected unanimity, it would be as to title to them when passed by a thief or a finder. What the French law upon the subject was I have endeavored elsewhere to show.[1] It had no resemblance whatever to that of England.

If there is any other point in the law of bills about which agreement would be expected, it would be that which (with us) declares that a transferee after maturity takes subject to existing equities. But in France that never was the law.[2] The Germans do not agree with either of us.[3]

And for *coup de grâce* let me quote from the Lex Mercatoria, in which it is said that the customs as to bills:

"In their formation, times of running, and falling due, days of grace, &c., are almost as various as each European nation from one another."[4]

What else could they be? With lay judges; no records. no law books (or next to none); facts, customs and laws, all jumbled together; little communication; no consultation—customs as various as the nations? Yes, as various as the county towns, or as one pepoudrous judge's notions from those of the other unskilled temporary adjudicators, with not even a Coke to help them.

Had I more space I would proceed to treat of several points still requiring explanation, but I must content myself with suggestion:

1. My notions seem to necessitate an inversion of generally assumed order; for have I not put courts first, and the law that they are to administer as something subsequent? Yes, I have done so; and that is perfectly right. The other theory: that there was a common law, an equity,

[1] 35 Am. Law Review, 722, ff.

[2] "L'endossement entraîne les mêmes conséquences qu'il soit anterieur ou posterieur a l'échéance." Lyon-Caen and Renault, s. 1094.

[3] See Law of 5 June, 1869, sec. 16. [4] p. 561.

a law merchant first, and then courts established to apply them, is not only unhistoric, but, save in the very simplest of social relations, quite impossible.

"It must be remembered that although we are naturally inclined to think of law as coming first, and courts being afterwards created to administer the law, it is really courts that come first, and that by their actions build up law, partly out of customs observed by the people, and partly out of their own notions of justice."[1]

2. Read Maine's Ancient Law (31–33) as to the "*in nubibus*" law, which courts are supposed in some mysterious way to precipitate out of the clouds into library receptacles. And reflect a little on the sentence:

"We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English Common Law, with some assistance from the Court of Chancery and from Parliament, are *coextensive with the complicated interests of modern society.*"

A most impudent pretender, that Common Law, I think.

3. And observe this paragraph extracted from a very good book:[2]

"The proper idea of a rule of law is that it is an attempt to sum up current opinion upon a class of cases. The possibility of constructing these rules, however, depends on two distinct faculties: the faculty of observation and the faculty of expression."

To which faculties the courts preposterous—I mean pepoudrous—had not the slightest claim. Coke and his century and a half of successors may have had them, but did not use them. Lord Mansfield, and not any pepoudrous predecessor "may be said to be the father of the commercial law,"[3] *the* father par excellence; but of course the family has been much extended since his day.

"Market law has long exercised and *still exercises* a dissolving and transforming influence. . . . The wish to establish as law *that which is commercially expedient is plainly visible in the recent decisions* of English courts of justice."[4]

"Legal rules must ever be adjusting themselves to the requirements of human relations."[5]

---

[1] Bryce's Studies in Hist. & Jur. 79.
[2] Lightwood's The Nature of Positive Law.
[3] Per Buller, J. in Lickbarrow *v.* Mason (1787), 2 T. R. 63.
[4] Maine's Vill. Com. 194.
[5] Lightwood's The Nature of Positive Law, 360.

4. The Law Merchant, it is suggested, is still in existence. May we not yet have hope in the lineotype? or, happy thought, that Marconi may some day, unsuspectingly, catch the thing? If emanations can reach him from *any*where, why not from *every*where? why not from the home of Teufelsdröch—Weissnichtwo?[1]

JOHN S. EWART.

[Through the courtesy of the Editors of THE REVIEW I have had the pleasure of reading Mr. Ewart's very interesting article, and am permitted to add a word of comment. It is, indeed, an article calculated to add to the gaiety of nations, even though it was intended to knock the Law of Nations into a cocked hat. I have laughed heartily at its sallies of wit, and been dazzled, if not enlightened, by its rhetorical pyrotechnics, but I do not see that it calls for a serious reply.

It may have been very inconsiderate of the ancient law merchant not to submit itself to the lineotype in England, and quite impudent not to get itself transformed into a "tangible, legible, concrete thing," a veritable *code de commerce* or *Handelsgesetzbuch*, which could be read, handled and laid away on a shelf by the doubting Thomases. Notwithstanding its delinquencies in these and other respects, it does not seem to me quite fair to brand it as a "phantom," "an empty abstraction or even hallucination," and cast it into outer darkness. However, I am consoled by the assurance that if this fate really awaits it, the common law, as even a more impudent pretender, shall accompany it on its descent into the "limbo of ambiguities."

F. M. B.]

[1] Carlyle's "Don't know where."